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7   UNITED STATES DISTRICT COURT

8   NORTHERN DISTRICT OF CALIFORNIA

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10 TERREL HOFFMAN,   )   Case No. C08 00301 JF (HRL)
)
11   Plaintiff,   )
)
12 vs.   )   TERREL HOFFMAN'S REPLY TO
)   DEFENDANT LIBERTY LIFE ASSURANCE
13   )   COMPANY OF BOSTON'S OPPOSITION TO
    LIBERTY LIFE ASSURANCE COMPANY   )   PLAINTIFF'S MOTION FOR PROTECTIVE
14 OF BOSTON, and SYNOPSYS, INC.   )   ORDER AND TO QUASH SUBPOENA
    LONG TERM DISABILITY PLAN,   )
15   )   Date: August 19, 2008
               Defendants.   )   Time: 10:00 a.m.
16   )   Courtroom: 2
)   Judge: The Honorable Howard Lloyd
17   )
)
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19 I.   RESPONSE TO LIBERTY'S LEGAL ANALYSIS.

20   A.   Liberty's argument that subpoenaing Plaintiff's severance agreement does not open
                    up the Administrative Record ignores the fact that Liberty could have obtained the
21   information during the claim and appeal process, thus making it part of the
                    Administrative Record; Allowing Liberty to Conduct Discovery to Correct the
22   Deficiencies of its Claim and Appeal Process Violates ERISA Case Law.

23   Liberty argues that it "is not limited to the Administrative Record in order to assert an

24 affirmative defense." (Opposition, 6:11-12) This assertion is not supported by any citation to

25 authority and is directly contrary to Taft v. Equitable 9 F.3d 1469, 1472 (9th Cir. 1993), which held

26 that permitting District Courts to consider evidence from either party that was not part of the

27 Administrative Record would seriously impair the achievement of ERISA's goal of providing a

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TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)

Page 1

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method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously. A claims administrator should adequately investigate a claim or ask the claimant for necessary information. (<u>Booton v. Lockheed Med. Benefit Plan</u>, 110 F.3d 1461, 1463-64 (9th Cir. 1997).)

If an ERISA Defendant is allowed to conduct discovery as to affirmative defenses, then ERISA Defendants will have no incentive to investigate a claim before denying it. This is illustrated by present case. Liberty's counsel's declaration documents that on June 6, 2008, she made a phone call to Synopsys, Inc. and was told that there had been a severance agreement entered into as part of the termination of Hoffman's employment. There is no reason why that phone call could not have been made during the claim and appeal process. Liberty tries to excuse its claims personnel's failure to perform this investigation by pointing out that they are not attorneys, but there is no explanation of why you need to be an attorney to check to see if there is a severance agreement. Liberty could ask the question on its claims forms.

Liberty's discussion of <u>Parisi v. Kaiser Foundation Health Plan Long-Term Disability Plan</u>, 2008 U.S. Dist. LEXIS, 5770 (M.D. Cal. 2008) ignores that Court's failure to consider the underlying policies of ERISA when it decided to admit the release. It also ignores 29 USC §1133, which requires denials of benefits to set forth the facts on which the denial is based. Finally, <u>Parisi</u> only considered the admissibility of evidence, not whether discovery is allowed in ERISA cases.

Liberty asserts that there has been no waiver of its right to evaluate a legal defense that may arise from a severance agreement. (Opposition, 7:1-2) That issue is not before the court at this time. However, it points out the kind of problems that may be created if Liberty is allowed to do discovery. If Liberty is allowed to get the severance agreement and decides that it creates a basis for an affirmative defense, then the answer will have to be amended, and new issues will be added to the present action. Then, the Court will have to evaluate competing arguments about whether the severance agreement does bar Plaintiff's claim. It may be necessary for Plaintiff to conduct discovery to find out whether there is a factual basis to argue that Liberty's failure to assert the severance agreement as part of its denial of Plaintiff's claim constitutes a waiver.

TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)

1   The 9th Circuit has made it clear that it does not want ERISA cases to turn into discovery

2   battles. (Abatie v. Alta Health & Life Ins. Co. 458 F.3d 955, 970 (9th Cir. 2006).)   Allowing

3   Defendants to conduct discovery as to affirmative defenses will require that Plaintiffs be allowed

4   to conduct discovery to counter the defenses.   The problem can be avoided by following existing

5   law and rejecting Liberty's argument that it can conduct discovery as to affirmative defenses.

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7   B.   Liberty's discovery is aimed at the merits of how the claim was handled because it
           seeks to undo the consequences of Liberty's failure to investigate the claim and
           appeal; and, if discovery is allowed, it may require interpretations of the policy, the
8   plan documents, or ERISA.

9   Liberty argues that because the information sought by the subpoena is not aimed at the

10   merits of the claim decision, it is relevant and admissible. (Opposition, 7:4-5) By referring to the

11   "merits of the claim decision," Liberty is presumably referring to medical evidence used to

12   determine whether Hoffman met the definition of disability.   However, the phrase "merits of the

13   claim decision" can just as easily refer to the overall quality of Liberty's investigation process. As

14   previously discussed, there is no reason why Liberty could not have obtained a copy of the

15   severance agreement during the investigation.

16   Liberty admits that discovery aimed at challenging the propriety of the claims decision is

17   improper (Opposition, 7:14-17), but seeks to analogize its discovery here to the discovery that is

18   permitted to establish a conflict of interest. (Abatie v. Alta Health & Life Ins. Co. 458 F.3d 955,

19   970 (9th Cir. 2006).)   This is not a good analogy because the issue of conflict of interest is not

20   claims determinative, but may affect the court's review of a claim decision.   In contrast, a release

21   may be made part of the Administrative Record and be used to deny a claim.   (See, Piehl v.

22   MetLife. 2005 U.S. Dist. Lexis 4619 (D.Or. 2005).)

23   Liberty further argues that allowing the discovery would not require interpretation of the

24   policy, the plan documents, or ERISA. (Opposition, 7:18-21) This is speculation, and is probably

25   incorrect. Assuming that there is a severance agreement that releases certain parties from certain

26   claims, the court may be required to decide whether Liberty is among the released parties and this

27   may require interpretation of ERISA. For example, in Groska v. Northern States Power Company

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TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)

1   Pension Plan, 2007 U.S. Dist. LEXIS 71081; 42 Employee Benefits Cis. (BNA) 2259 (D. Minn.

2   2007), one of the issues was whether a severance agreement and release barred a disability claim.

3   The court spent several pages discussing this issue. Ultimately the court held that because ERISA

4   recognizes the separate existence of employee benefit plans under *29 U.S.C. §1132(d)(1) and (2)*,

5   and because the plan was not named as a released entity, the claim for disability benefits was not

6   barred by the release. (Id. at 22-24) This shows that the District Court may be required to

7   construe ERISA if Liberty is allowed to conduct discovery.

8   C.   Liberty's argument that it should be allowed to conduct discovery because waiver
              of benefits under ERISA is a viable defense ignores 9th Circuit authority that
9   requires ERISA claims to be fully evaluated during the claim and appeal process.

10 Hoffman does not dispute Liberty's point that a properly drafted severance and release

11 agreement signed upon termination of employment can operate to bar a Plaintiff's claim for

12 disability benefits under ERISA. However, Liberty's assertion that, if the end result is permissible,

13 a subpoena is also permissible, does not follow, and Hoffman disagrees with it. (Opposition, 8:20-

14 22)

15   As pointed out throughout Plaintiff's Motion to Quash and in this Reply Brief, discovery in

16 ERISA cases subject to an abuse of discretion standard is limited to evidence bearing on a claims

17 administrator's conflict of interest. (Abatie, supra) The reasons for this limitation include that it

18 promotes full development of the issues in a non-adversarial context (Amato v. Bernard, 618 F.2d

19 559, 567 (9th Cir. 1980)), and it is supposed to provide a method for workers and beneficiaries to

20 resolve disputes inexpensively and expeditiously. (Taft, supra)   Arguing that discovery is

21 permitted because it may produce relevant information is contrary to this rule.

22   Liberty cites Hallstead v. Liberty Life Assurance Co. of Boston, Case No. SA CV05-0735

23 DOC (MLGx) (C.D. Cal. April 12, 2006) for the proposition that the court can consider a

24 severance agreement and release that was not contained in the Administrative Record or used as a

25 basis for the denial. However, the Hallstead court failed to explain how doing so is consistent with

26 ERISA's policies, or with *29 U.S.C. 1133*, which requires that all facts on which the denial is

27 based be set forth in the denial letter.

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TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)

Page 4

1   Liberty's decision to introduce a copy of Hoffman's Order Approving Compromise and

2   Release in her Workers' Compensation claim as a basis for allowing the discovery is surprising.

3   (Ex. A to Declaration of Jennifer Williams.) Hoffman disclosed this information because Rule 26

4   requires Plaintiff's Disclosures to set forth the basis for their claim of damages, and the Workers'

5   Compensation benefits that Hoffman received are part of that issue because they are offsettable.

6   Hoffman had anticipated that Liberty would have objected to the introduction of the Workers'

7   Compensation information for any other purpose, but Liberty has now introduced the evidence.

8   D.   Liberty's Argument That Allowing It To Obtain Discovery Would Promote
              Efficiency Is Contrary To The Rule That The District Court's Review Of ERISA
9   Disputes Should Be Limited To The Administrative Record.

10   Liberty argues that, if discovery is denied and Hoffman wins her case for own occupation

11   benefits, the claim will then be remanded to Liberty for consideration of further benefits, and that

12   Liberty will then evaluate whether any severance agreement that Hoffman may have signed bars

13   her receipt of disability benefits. (Opposition, 9:4-24) From this premise, Liberty argues that it

14   would be more efficient for the court to allow discovery so that the effect of the severance

15   agreement can be determined sooner, by the court, rather than later, by the claims administrator.

16   However, having the claims administrator perform the initial evaluation of the severance

17   agreement is what ERISA requires.

18   Defendant's argument asks the court to allow discovery where it has never previously been

19   allowed for nothing more than potential expediency in this case. Allowing discovery outside of

20   the very narrow boundaries established by Abatie, supra, is not something that should be done

21   based on potential expediency in one case.

22   E.   A Protective Order ensures that Liberty will not pursue other efforts to engage in
              discovery in this matter.
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24   A protective order may be issued to protect a party from oppression and undue burden or

25   expense. If the Court quashes the subpoena but does not issue a protective order, Liberty might

26   attempt to conduct prohibited discovery in some other fashion. Having to defend against other

27   attempts to obtain prohibited discovery would constitute oppression, or undue burden or expense.

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TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)

1   Therefore, a protective order is appropriate.

2   Liberty complains that Hoffman has coined the term "Administrative Remedy Rule."

3   (Opposition, 10:6-8) It is true that phrase is not used in case law. Rather than those exact words,

4   case law speaks in terms of there being a requirement to "exhaust administrative remedies,"

5   (Amato, supra at 567; Abatie, supra at 961), which requires both parties to present their evidence

6   to the plan administrator, and prohibits district courts from considering evidence not presented to

7   the plan administrator. (Taft, supra at 1472) This exhaustion requirement results in the exclusion

8   of evidence for and against the ultimate issue of whether the claimant is entitled to benefits. (See.

9   e.g., Opeta v. Northwest Airline Pension Plan, 484 F.3 1211, 1219-1220 (9th Cir. 2007).) Plaintiff

10   submits that referring to this exhaustion of administrative remedies requirement as the

11   Administrative Remedy Rule is a reasonable characterization of this aspect of ERISA law.

12   II.   CONCLUSION

13   Our courts have strictly limited discovery in ERISA cases to support the language of the

14   statute and the policies underlying the statute. Liberty has been unable to cite a single case in

15   which discovery in support of an affirmative defense has been allowed.

16   Liberty has cited two District Court cases in which releases that were not part of the

17   Administrative Record were admitted into evidence. However, these cases failed to acknowledge

18   ERISA's policies or even cite 29 U.S.C. §1133. More importantly, these were cases where the

19   Defendant had the evidence and they do not support the position that discovery can be conducted.

20   Liberty's request for discovery is contrary to 29 U.S.C. §1133, the policies underlying the

21   statute, and case law. Therefore, Plaintiff's Motion to Quash should be granted and a protective

22   order issued to ensure that Hoffman will not have the burden of responding to further discovery

23   requests.

24   DATE: August 5, 2008   FLYNN, ROSE & PERKINS

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26   By____/s/ Charles B. Perkins_____
                                CHARLES B. PERKINS
27   Attorney for Plaintiff

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TERREL HOFFMAN'S REPLY TO DEFENDANT LIBERTY LIFE ASSURANCE COMPANY OF BOSTON'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, CASE NO. C08 00301 JF (HRL)